STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
(Murray P.J., Gage & Kelly JJ.)

JOSEPH and THEODORA STAMPLIS,

Plaintiff-Appellees,

vs.

ST JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,

Defendant-Appellant,

and

G. PHILLIP DOUGLASS, D.O., jointly and severally, HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants. /

Supreme Court
No. 126980

Court Of Appeals
No: 241801

St. Clair County Circuit Court
No: K01-1051-NH

BRIEF FOR DEFENDANT-APPELLANT RIVER DISTRICT HOSPITAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE STIPULATED ORDER OF DISMISSAL WITH PREJUDICE OF DR. DOUGLASS OPERATED AS RES JUDICATA--AN ADJUDICATION ON THE MERITS--SO AS TO PRECLUDE PLAINTIFFS FROM PURSUING A CLAIM BASED ON DR. DOUGLASS' CONDUCT UNDER A THEORY OF VICARIOUS LIABILITY AGAINST RIVER DISTRICT HOSPITAL?

Defendant River District Hospital submits the answer is "Yes."

Plaintiffs assert the answer is "No."

The Court of Appeals held the answer is "No."

The trial court held the answer is "Yes."

II

WHETHER THE 1995 AMENDMENT OF MCL 600.2925D IMPACTED THE CURRENT VIABILITY OF THEOPHELIS V LANSING GENERAL HOSPITAL, 430 MICH 473 (1988), AND, IF SO, WHETHER SUCH CHANGE HAS ANY IMPACT ON THE ISSUE HERE OF THE RES JUDICATA EFFECT OF A JUDICIAL JUDGMENT OF DISMISSAL WITH PREJUDICE?

Defendant River District Hospital submits the answer is "No."

Plaintiffs assert the answer is "Yes"

The Court of Appeals was not asked to and did not address this issue.

The trial court was not asked to and did not address this issue.

III

WHETHER THE COURT OF APPEALS MAJORITY CLEARLY ERRED IN CONCLUDING, ALBEIT FOR ENTIRELY DIFFERENT REASONS, THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO SET ASIDE THE STIPULATED VOLUNTARY ORDER OF DISMISSAL WITH PREJUDICE FOR EITHER FRAUD OR MISTAKE, WHERE NEITHER FRAUD NOR MISTAKE WAS SO CLEARLY ESTABLISHED ON THIS RECORD AS TO PERMIT THE COURT OF APPEALS TO INTERFERE WITH THE TRIAL COURT'S EXERCISE OF DISCRETION?

Defendant River District Hospital submits the answer is "Yes."

Plaintiffs assert the answer is "No."

The Court of Appeals held the answer is "No."

The trial court was not asked to and did not address this issue.

INDEX OF AUTHORITIES

CASES **PAGE**

STATUTES, COURT RULES AND OTHER AUTHORITIES

STATEMENT OF FACTS

Defendant River District Hospital appeals by leave granted by this Court by order of January 27, 2006 (Apx 29a), from the Court of Appeals per curiam opinion of June 1, 2004 (Apx 16a-25a).

This matter was before the Court of Appeals on appeal by plaintiffs Joseph Stamplis and Theodora Stamplis from the dismissal of their medical malpractice claims against River District Hospital by St. Clair County Circuit Court Judge Daniel J. Kelly, on summary disposition. This was as a consequence of the res judicata effect of the stipulated order dismissing codefendant G. Phillip Douglass, D.O., with prejudice (stipulation and order, Apx 3a).

That order of dismissal as to Dr. Douglass implemented an agreement proposed by plaintiffs' counsel and accepted by codefendant Dr. Douglass. The trial court determined that the dismissal with prejudice of Dr. Douglass, whose alleged malpractice and wrongdoing was the sole basis upon which vicarious liability was asserted against River District Hospital by the time of trial, required dismissal of the hospital as well under principles of res judicata.

As set forth further below, Judge Daniel Kelly thereafter denied plaintiffs' motion for relief from judgment under MCR 2.612(C), in which plaintiffs sought to set aside the stipulated order of dismissal for "mistake" and/or "fraud." The course of events leading to that order, and the Court of Appeals decision are as follows.

Pretrial Proceedings

Plaintiffs originally filed this medical malpractice claim in Wayne County Circuit Court on December 7, 1998 against three hospitals, including River District Hospital and Henry Ford Hospital, and 13 physicians. Plaintiffs alleged that there was a breach of the standard of practice by the various health care providers in failing to timely identify and treat

an epidural abscess in Mr. Stamplis during several hospital admissions between January 27, 1997 and February 1, 1997. Plaintiffs alleged that such delay proximately caused plaintiff Joseph Stamplis to be rendered a paraplegic.

During discovery, Dr. Douglass and River District Hospital initially were jointly represented by attorney Jane Garrett. As discovery proceeded, plaintiffs settled with and dismissed various defendants.

By order of March 29, 2001, venue was transferred to St. Clair County Circuit Court. On June 28, 2001, attorney Ralph Valitutti substituted in as counsel for defendant River District Hospital, while Ms. Garrett continued to represent Dr. Douglass.

By the time of trial, which began nearly a year after the splitting of the defense of the Hospital and Dr. Douglass, on April 16, 2002, the only defendants remaining in the case were this defendant, River District Hospital, and codefendants Henry Ford Hospital and Dr. Douglass. Dr. Douglass had been given the opportunity by plaintiff to settle for payment of his insurance policy limits but had declined, choosing a trial on the merits to clear his name, and so that there would be no need to report a settlement to the "National Practitioner Data Bank." (See Tr II, pp 19, 22, Apx 74a, 77a, 42 USC 11131.)

By the time of the events at issue in this appeal, the sole remaining claim against River District Hospital was that it was vicariously liable for the alleged malpractice of Dr. Douglass in treating plaintiff Joseph Stamplis. However, River District Hospital from the inception of this matter consistently had denied that Dr. Douglass was its agent, or that he had breached the standard of practice (Complaint, and answer by River District Hospital, paragraph 19, Apx 31a-34a).

Trial And Agreement Between Plaintiffs And Dr. Douglass

On the morning of April 16, 2002, the first day of trial, counsel for plaintiffs approached counsel for Dr. Douglass, Ms. Jane Garrett. Plaintiffs' counsel unilaterally offered to voluntarily dismiss Dr. Douglass with prejudice without payment, if the doctor remained at court long enough to testify when called by plaintiffs. Previously, plaintiffs had demanded payment of all insurance coverage available to Dr. Douglass before dismissal (see statement by counsel for Dr. Douglass at Tr II, p 19, Apx 74a).

Thereafter, the parties or their representatives, their counsel and Judge Kelly convened in a chambers' conference room for the purpose of placing on the record all settlement offers and/or agreements (Tr I, pp 4-7, Apx 38a-41a). Judge Kelly turned to each of the assembled groups, inquiring of each counsel regarding their own client's settlement stipulations and offers (Tr I, pp 6-7, Apx 40a-41a). The court began its inquiry with Mr. and Mrs. Stamplis and their counsel (Tr I, pp 7-8, Apx 41a-42a), and then turned to counsel for Dr. Douglass (Tr I, pp 8-9, Apx 42a-43a).

Counsel for Dr. Douglass recounted acceptance of plaintiffs' offer, and the agreement between Dr. Douglass and plaintiffs (Tr I, p 9, Apx 43a). The hospital had not in any way participated in or agreed to the settlement agreement between plaintiffs and Dr. Douglass (see trial court at Tr II, p 32, Apx 87a) statement by hospital's counsel at (Tr II, pp 9-10, Apx 64a-65a), statement by plaintiffs' counsel at (Tr II, pp 28, 32, Apx 83a, 87a). As later pointed out by counsel for Dr. Douglass, the obvious motive of plaintiffs' counsel for such a strategic move was to eliminate at trial a sympathetic individual defendant with his own adversarial trial counsel, and leave the deep pocketed corporate defendants to face the jury alone:

> [BY MS. GARRETT:] Obviously, this arrangement also had the benefit for plaintiffs that they would then be opposing only two corporate defendants, no individual defendant, and they would be opposing two lead counsel rather than three. [Tr II, p 20, Apx 75a].

(See also similar observation by counsel for the hospital at Tr II, p 26, Apx 81a).

After counsel for Dr. Douglass recounted the agreement between her client and plaintiffs (Tr I, pp 7-8, Apx 41a-42a), counsel for plaintiffs stated that he did intend to dismiss Dr. Douglass as a defendant and proceed against what he "presumed" to be Dr. Douglass' principal, River District Hospital. Counsel for Dr. Douglass, however, replied and made clear what the agreement had been, and that the dismissal of Dr. Douglass had to be, with prejudice, with which plaintiffs' counsel agreed:

> MR. KENNEY [plaintiff's counsel]: I intend to dismiss Dr. Douglass as a defendant and proceed against what I presume to be his principal, the hospital, that's my agreement.
>
> THE COURT: Okay.
>
> MR. KENNEY: And the other terms he will remain until the close of business Friday so that I can put him on the stand, that's part of the agreement, as well.
>
> MS. GARRETT [counsel for Dr. Douglass]: Well, I believe that it was agreed in chambers that it would be a dismissal with prejudice.
>
> MR. KENNEY: With prejudice, but what I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Dr. Douglass. I'm not doing that. He was the actor.
>
> THE COURT: I understand that. I'm sure they do, too. Next.
> [Tr I, pp 9-10, Apx 43a-44a].

The last statement by the trial court regarding understanding the plaintiffs' intent followed and was specifically with reference to plaintiffs and Dr. Douglass, and to their comments regarding their separate understandings of their specific agreement (Tr I, p 10, Apx 44a).

The hospital was not a party to or involved in the settlement agreement between the doctor and plaintiffs. Counsel for the hospital had no reason to comment on the same at the time. Further, this was not in the context of a courtroom setting, nor were counsel expected or permitted to engage in legal argument.

The trial judge then turned to Mr. Valitutti, counsel for River District Hospital, to place on the record his client's settlement position. Mr. Valitutti did so, stating the Hospital's offer of $300,000 (Tr I, pp 10-11, Apx 44a-45a). Counsel for Henry Ford Hospital, then placed on the record settlement offer they had made to plaintiffs (Tr I, pp 11-12, Apx 45a-46a).

Following a break, proceedings reconvened, again in chambers (Tr I, pp 12-13, Apx 46a-47a). Plaintiffs indicated that they had rejected the settlement offers of River District Hospital and Henry Ford Hospital, and wished to proceed to trial (Tr I, pp 13-14, Apx 47a-48a).

At this point, counsel for Dr. Douglass noted for the record that over the noon hour a stipulation and order of dismissal of Dr. Douglass had been prepared and executed by all counsel, and had just been signed by the court (Tr I, p 15, Apx 49a). As conceded by plaintiffs' counsel upon later inquiry by the trial court, whatever intentions had been expressed orally by plaintiffs' counsel at the in-chambers conference, the stipulation and order of dismissal included no provision reserving any claim by plaintiffs against the hospital based on vicarious liability for Dr. Douglass (Tr II, p 28, Apx 83a, stipulation and order, Apx 3a).

The parties then began to discuss the voir dire procedure (Tr I, pp 15-19, Apx 49a-53a). At that point, and based on the legal effect of the order of dismissal of Dr. Douglass which had been entered, counsel for River District Hospital requested an opportunity to present a motion for summary disposition on behalf of the hospital prior to proceeding with voir dire. The trial court indicated that the motion would have to wait until after the jury was selected (Tr I, pp 19-20, Apx 53a-54).

Counsel for plaintiffs then suggested that counsel for Dr. Douglass should leave the courtroom. Counsel for Dr. Douglass indicated that she would leave unless she was asked to

stay; after conferring with counsel for the hospital, Ms. Garrett indicated that she would appear as co-counsel for River District Hospital at that point (Tr I, p 20, Apx 54a). (As Ms. Garrett had represented River District Hospital for the first three years of the litigation and during virtually all discovery, access to her knowledge during what would be a very lengthy trial was obviously important to the hospital.)

Voir dire proceeded on the afternoon of April 16, 2002, with Ms. Garrett acting as co-counsel for the hospital before the jury.

Hospital's Motion To Dismiss Based On Res Judicata
Effect Of Dismissal With Prejudice

On the morning of April 17, 2002, before continuing with voir dire, the court excused the jury in order to more fully discuss the motion for summary disposition on behalf of the hospital (Tr II, p 7, Apx 62a). Counsel for the hospital submitted that the order of dismissal with prejudice entered as to Dr. Douglass was entitled to res judicata effect and required the dismissal of the hospital as the only claims against it were based on vicarious liability for Dr. Douglass. The hospital's counsel relied upon Brownridge v Michigan Mutual Ins Co, 115 Mich App 745, 748; 321 NW2d 798 (1982), and Limbach v Oakland County Road Commissioners, 226 Mich App 389; 573 NW2d 336 (1997).

Hospital counsel acknowledged the case of Larkin v Otsego Memorial Hospital, 207 Mich App 391; 525 NW2d 475 (1994), but submitted that it was distinguishable from this matter on several grounds. Counsel for the hospital noted that, in contrast to Larkin, no agreement was ever entered here that the hospital would be responsible for the actions or omissions of the doctor. Further, counsel for the hospital here was not a party to the negotiations regarding or agreement to dismiss Dr. Douglass, as had been the case in Larkin (Tr II, pp 8-10, Apx 63a-64a).

Plaintiffs' counsel responded that if in fact the stipulated order of dismissal with prejudice had a res judicata effect, it should be set aside because "whether or not Mr. Valitutti agreed with that or not, the clear intent that I had and my clients had in dismissing Dr. Douglass was to A, avoid his having to stay here for the entire length of the trial, to get him on and off the stand, and to proceed against the principal." (Tr II, pp 12-13, Apx 67a-68a) Plaintiffs' counsel suggested that "we can have a decision on the merits of this case by merely indicating that this was a dismissal without prejudice," and that there could be an agreement not to again sue Dr. Douglass, in the nature of a covenant not to sue (Tr II, pp 13-14, Apx 68a-69a). Counsel for plaintiff for the first time asked that the order reflect the dismissal of Dr. Douglass without prejudice (Id.).

In response to plaintiffs' counsel's demand that the dismissal with prejudice be amended into a dismissal without prejudice, counsel for Dr. Douglass objected strenuously. Counsel noted that this would violate the parties' agreement, and further noted that plaintiffs' counsel's intent with regard to another defendant had not been any part of the agreement between plaintiffs and Dr. Douglass, nor part of the written stipulation and order entered by the court:

> [MS. GARRETT:] What Mr. Kenney may have intended with regard to another defendant is not part of our agreement. I did not have any authority or interest in making concessions on the part of another defendant, what they would do, what their liability would be, what Mr. Kenney's case against them would be. My concern was with Dr. Douglass. The exchange was that he would be dismissed without payment if he would continue to make himself available for testimony until Friday of this week.
>
> The stipulation, including the language with prejudice, which was a crucial factor to my mind, was stated in chambers in the presence of the court and all counsel. Plaintiff agreed with the statement. The stipulation was restated on the record twice, I believe, that it was with prejudice. A written stipulation and order was prepared over the lunch hour. It was presented to Mr. Kenney for review after we got back from lunch. He took it out to confer with his co-counsel. He signed the stipulation. The court entered the order. Two

copies were made and they were circulated to all counsel. I believed this issue was closed. [Tr II, pp 20-21, Apx 75a-76a].

Counsel for Dr. Douglass further noted that dismissal with prejudice was crucial to Dr. Douglass to ensure that the case had been fully and finally decided as to him, and that he was protected from any further action (Tr II, p 21, Apx 76a).

Counsel for Dr. Douglass objected to the court entering an order contrary to the parties' agreement:

> [MS. GARRETT:] Plaintiffs appear to be suggesting that the court convert the order that we entered into expressly to a different agreement which we did not enter into. I did not agree to a dismissal without prejudice. Under those circumstances, Mr. Kenney, if the current trial does not turn out the way he likes can turn around and sue Dr. Douglass again because the statute has a substantial time to run, having been told [sic, tolled] during a pendency of this litigation. I did not agree to a covenant not to sue. That also has implications for further action that can be taken against my defendant [e.g., for indemnification]. My objective was to extricate him from this case finally and totally, and that is the purpose of these orders with prejudice, to have some finality to the positions of the parties. [Tr II, p 22, Apx 77a].

Counsel for Dr. Douglass reiterated that there had been no discussion of, or agreement to a covenant not to sue; what had been agreed to, and ordered by the court, was a dismissal with prejudice (Tr II, p 27, Apx 82a).

In response to inquiry by the court, counsel for plaintiff conceded that his only agreement had been with counsel for Dr. Douglass and not with the hospital:

> THE COURT: The question I have to address is who was your agreement with. Was it with counsel for Dr. Douglass only or was it with counsel for Dr. Douglass and counsel for River District Hospital?
>
> MR. KENNEY: My agreement was with Dr. Douglass' lawyer. * * *
>
> I do not intend to dismiss the claims against the hospital for the actions of Dr. Douglass.
>
> THE COURT: I understand that. The question comes is that classified as a mistake of law or a mistake of fact.
>
> MR. KENNEY: I think it's a mistake of fact because it's a mistake as to what our agreement was. Because I'm thinking that our agreement is -

THE COURT: Again, your agreement with whom?

MR. KENNEY: My agreement with Dr. Douglass.

* * *

MR. KENNEY: And the intent of my agreement with Dr. Douglass is that I will dismiss you as long as my dismissal of you does not operate to dismiss my claims against the hospital. That's a covenant not to sue.

THE COURT: That's the critical point. You can have an agreement with them, but they're not in a position to speak for the hospital.

MR. KENNEY: I appreciate that. But still, nevertheless, a covenant not to sue would be the same thing. [Tr II, pp 29-30, Apx 84a-85a].

Responding to plaintiffs' counsel's belief that the court had stated earlier that plaintiff could still pursue a claim of vicarious liability against the hospital, the court indicated that it had simply meant that counsel had made his point. The court noted, however, that this did not suffice to render the parties bound to an interpretation of "with prejudice" that would not have the normal meaning attached to it by the law (Tr II, p 33, Apx 88a).

Trial Court Ruling

After considering arguments of the parties and plaintiffs' request for relief from judgment or order under MCR 2.612, and indicating that it was the preference of the court to decide cases upon their merits, Judge Daniel Kelly found that he could not grant relief where plaintiffs' claim of vicarious liability was barred by operation of law because the dismissal with prejudice had res judicata effect as a matter of law:

[THE COURT:] The decision to dismiss Dr. Douglass with prejudice is res judicata as to any liability against River District Hospital. The law is well settled on that point. Further, there is no credible evidence that the dismissal was understood by the doctor to be merely a covenant not to sue. At the same time, the record is also very clear that counsel for plaintiff never intended to waive his right to pursue vicarious liability claims against River District Hospital. Unfortunately for plaintiffs it has had that legal effect.

Silence in the face of plaintiff's counsel's declaration of intent does not amount to an agreement. The attorneys for the defendants owed their duty only to their clients. Further, I am of the opinion that the relief being sought under MCR 2.612 is not justified under the facts of this case. Any mistake made is a mistake of law and not of fact.

> Plaintiff's counsel repeatedly acknowledged that the dismissal was to be with prejudice. Nowhere did River District Hospital agree to waive its legal defense of res judicata. Additionally, while subsection (c) (1) (f) offers broad leeway when extraordinary circumstances demand vacating orders to achieve justice, it has never been interpreted to be designed to relief [sic] of ill-advised or careless decision. [Tr II, pp 35-36, Apx 90a-91a].

Shortly thereafter, counsel for plaintiffs and counsel for codefendant, Henry Ford Hospital, placed on the record an agreement to settle the claim against Henry Ford for 1.5 million dollars (Tr II, pp 38-39, Apx 93a-94a). (This was in addition to the $850,000 which had been paid in settlement by previously dismissed defendants.)

Plaintiffs filed a motion for reconsideration of the denial of their motion for relief from judgment, which the trial court denied after allowing argument by counsel (Tr 5/13/02, Apx 103a-107a, Order, Apx 6a). Plaintiffs thereafter appealed to the Court of Appeals.

Court of Appeals Opinion

In the sharply divided, yet unpublished, opinion, two of the three judges of the Court of Appeals (Hilda Gage and Kirsten Frank Kelly), by two separate opinions, concluded that, on different grounds and for different reasons, St. Clair County Circuit Court Judge Daniel J. Kelly had abused his discretion in declining to set aside under MCR 2.612 a stipulated order of dismissal of Dr. Douglass with prejudice. The two judge majority also apparently concluded the dismissal with prejudice would not have had res judicata effect, for purposes of barring vicarious liability claims against River District Hospital for Dr. Douglass' conduct, based upon the majority opinion in Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995) (although the lead opinion is not entirely clear in this regard as to how, or whether this issue was decided here).

Judge Gage in the first opinion of the Court of Appeals stated that Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995), in which the Court of Appeals had held that the nature of the agreement for dismissal in that case was such

that it did not have res judicata effect "would be applicable but for the conduct of the parties' attorneys before the trial court" (Slip opinion, p 6, Apx 13a). This statement is not entirely clear, in that the first opinion goes on to conclude the judgment should be set aside under MCR 2.612 (which discussion would be entirely unnecessary if the Court believed Larkin applicable).

Two of the three judges, Hilda Gage and Kirsten Frank Kelly, by two separate opinions, they concluded that, on different grounds and for different reasons, St. Clair County Circuit Court Judge Daniel J. Kelly had abused his discretion in declining to set aside a stipulated order of dismissal under MCR 2.612(A) or (C). In the lead opinion for reversal, Judge Gage concluded that Judge Daniel Kelly abused his discretion in declining to set aside the judgment under MCR 2.612(C)(1)(a)(c) and/or (d). Judge Gage concluded that there was a mistake by plaintiff's counsel "with respect to the effect of the written stipulation," and, apparently "fraud" by Mr. Ralph Valitutti, counsel for the hospital, on the trial court and/or opposing counsel in this adversarial proceeding (Apx 13a-15a).

In the second opinion for reversal, Judge Kelly concludes that Judge Daniel Kelly abused his discretion in failing to set aside the stipulation, and order, because of a "clerical mistake," under MCR 2.612(A) (although no request was ever made by plaintiff on this ground, either below or on appeal) (Apx 16a-18a).

Judge Christopher Murray in an opinion for affirmance dissented on the basis that "the law and facts of record require that the learned trial court judge, who was intimately more familiar with the attorneys and proceedings occurring before it, be affirmed" (Apx 19a-25a).

Supreme Court Proceedings

Defendants River District Hospital and Dr. Douglass thereafter each filed applications for leave to appeal to this Court. The Court by order of July 8, 2005, directed that oral

argument be held on the applications on whether they should be granted or other action taken. The Court further directed that the parties include among the issues to be addressed "(1) whether the doctrine of res judicata applies to the stipulated order dismissing the suit against G. Phillip Douglass, and (2) whether the trial court abused its discretion in failing to grant plaintiff's motion for relief from judgment or its motion for reconsideration" (Apx 27a). Plaintiff filed a supplemental brief arguing, for the first time, that release of an agent does not release the principal upon operation of MCL 600.2925d, as amended by the 1995 tort reform act. Oral argument was held on the applications on December 15, 2005.

By order of January 27, 2006, this Court granted defendants' applications for leave to appeal, and also directed that the parties include among the issues to be briefed "the impact, if any, of the 1995 amendment of MCL 600.2925d on the current viability of Theophelis v Lansing General Hospital, 430 Mich 473 (1988)" (Apx 29a).

Defendant River District Hospital now seeks reversal of the Court of Appeals per curiam opinion of June 1, 2004. Defendant seeks reinstatement of the trial court's order of dismissal with prejudice as to Dr. Douglass, and of summary disposition as to the Hospital.

SUMMARY OF ARGUMENT

Under both long established common law and MCR 2.504, a stipulated order of dismissal with prejudice of an agent is to be given res judicata effect. As such, it bars claims against the agent as well as claims of vicarious liability against an alleged principal for the actions of the dismissed agent. This Court should reject the contrary analysis of the majority of the Court of Appeals in Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995), declining to apply basic legal principles in order to avoid an undesired, but legally compelled result.

Defendant submits that the reaffirmation in Theophelis v Lansing General Hospital, 430 Mich 473, 485-487; 424 NW2d 478 (1988), that a contractual release of an agent operates to eliminate the basis for vicarious liability of a principal was not affected by the 1995 amendment of the contribution statute, MCL 600.2925d. The analysis of Theophelis focused only in part on the import of the word "tortfeasor" in the 1974 act. While substitution of "person" for "tortfeasor," renders part of the rationale in Theophelis inapplicable, the elimination of that term does not abrogate the doctrine, given (1) the remainder of the rationale in Theophelis, (2) the full context of the 1995 amendments, as well as (3) other considerations the Court did not need to reach or address in Theophelis given the narrow scope of the plaintiff's argument and the Court's analysis. Where, as here, liability is premised on pure vicarious liability of a principal for acts of an alleged agent, an agent and principal cannot fairly be considered separate ("2 or more") "persons" which is the condition precedent to application of the provisions of MCL 600.2925d(a) and (b).

Defendant further submits, however, that this is an issue that really has no direct relevance to this matter. MCL 600.2925d and the 1995 amendment were related to the impact of contractual releases and covenants not to sue. While the doctrines of release and res

judicata serve similar purposes of finality and reduction of litigation, the statute does not purport to have any application to the effect of a court judgment dismissing a party to litigation with prejudice.

Contrary to the conclusion (for different reasons) by two judges of the Court of Appeals, there is not a basis in law or in this record upon which it could be found that Judge Daniel Kelly abused his discretion in denying plaintiffs' request that the order of dismissal with prejudice implementing the agreement with Dr. Douglass sought and pursued by plaintiffs' counsel be set aside under MCR 2.612(C). The Court of Appeals failed to apply the appropriate deferential standard of review to the trial court's exercise of discretion. The first opinion erroneously found fraud by silence and mistake premised upon imposition of obligations upon counsel representing adversaries in litigation that are fundamentally inconsistent with their ethical obligation of zealous representation. The complained-of unilateral mistakes of fact or law by plaintiff's counsel as to the effect of an order of dismissal with prejudice, and defense counsel's silence regarding the same, do not suffice as a basis upon which to reverse the trial court for an abuse of discretion.

The trial court's orders of dismissal with prejudice of Dr. Douglass and River District Hospital should be reinstated.

ARGUMENT

I. THE STIPULATED ORDER OF DISMISSAL WITH PREJUDICE OF DR. DOUGLASS OPERATED AS RES JUDICATA--AN ADJUDICATION ON THE MERITS--SO AS TO PRECLUDE PLAINTIFFS FROM PURSUING A CLAIM BASED ON DR. DOUGLASS' CONDUCT UNDER A THEORY OF VICARIOUS LIABILITY AGAINST RIVER DISTRICT HOSPITAL; LARKIN V OTSEGO MEMORIAL HOSPITAL ASSOCIATION SHOULD BE DISAVOWED BY THIS COURT.

The trial court held that the voluntary stipulated order of dismissal with prejudice of an agent operates as res judicata and precludes a claim based on the agent's conduct under Limbach v Oakland Board of Road Commissioners, 226 Mich App 389, 392-393; 573 NW2d 336 (1997). Judge Murray, in his dissent in the Court of Appeals, agreed.

The Court of Appeals in the first opinion stated that Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995), in which the Court of Appeals had held that the nature of the agreement for dismissal with prejudice there was such that it did not have res judicata effect, "would be applicable but for the conduct of the parties' attorneys before the trial court" (Slip opinion, p 6, Apx 13a). This statement is not entirely clear in that the lead opinion goes on to conclude the judgment should be set aside under MCR 2.612 (which would be unnecessary if the Court believed Larkin applicable).

Regardless, however, defendant submits that under basic principles of Michigan jurisprudence, a voluntary dismissal with prejudice of an agent operates as res judicata as to, and precludes a claim against a principal based on, the question of the agent's negligence. This Court should reject as flawed the analysis of the two-judge majority in Larkin, supra, and in any event declare that opinion is of no application factually or legally to the facts here.

A. A Stipulated Order Of Dismissal Expressly Made "With Prejudice" Operates As An Adjudication On The Merits, And Has Res Judicata Effect Pursuant To Long Established And Fundamental Common Law Principles, As Codified By This Court In MCR 2.504.

"The doctrine of res judicata applies to default judgments and consent judgments as well as to judgments derived from contested trials, and includes every point properly the subject of the litigation which the parties could have brought forward at the time." Werden v Cook, 155 Mich App 604, 609; 400 NW2d 695 (1986). Michigan law is clear and long established that an order of dismissal expressly made and entered "with prejudice" pursuant to stipulation of the parties is a final judgment on the merits for, and has, res judicata effect. Limbach v Oakland Board of Road Commissioners, 226 Mich App 389, 392-393; 573 NW2d 336 (1997), Boland v CD Barnes Associates, 126 Mich App 337 NW2d 581 (1982), Brownridge v Michigan Mutual Insur Co, 115 Mich App 745, 748; 321 NW2d 798 (1982). As is declared in 46 Am Jur 2d Judgments, § 609:

> The term "with prejudice" expressed in a judgment of dismissal, has a well recognized legal import; and it indicates an adjudication of the merits, operating as res judicata, concluding the rights of the parties, terminating the right of action, and precluding subsequent litigation of the same cause of action, to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff.

In Brownridge v Michigan Mutual Ins Co, supra, plaintiff stipulated to the dismissal with prejudice of a sex discrimination claim she had filed in federal court and an order dismissing the case with prejudice was entered. In dismissing a subsequent suit by plaintiff against the employer in state court alleging a violation of the Uniform Trade Practices Act, the Court held that the state court claim was barred by res judicata. The Court of Appeals held that "'a voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes.'" Brownridge, supra, 748.

In Boland v CD Barnes Associates, Inc, 126 Mich App 569, 571-572; 337 NW2d 581 (1983), the Court, quoting from Brownridge, supra, held that a voluntary dismissal with prejudice pursuant to stipulation of the parties in a foreclosure action barred under the doctrine of res judicata a subsequent claim between the same parties for the improper filing and perfecting of a mechanics' lien on the same office complex project.

In Limbach v Oakland County Board of County Road Commissioners, 226 Mich App 389; 573 NW2d 336 (1997), driver Limbach sued Oakland County. In a second suit the other driver, Koutsouradis, sued Limbach and Oakland County. Limbach cross claimed for indemnification against Oakland County. Koutsouradis settled his claims and Limbach agreed to voluntarily dismiss the cross claim against Oakland County with prejudice. Oakland County obtained dismissal of the first, Limbach lawsuit on grounds of res judicata, on the basis that the dismissal with prejudice in the Koutsouradis lawsuit barred Limbach from pursuing claims against Oakland County. The Court of Appeals affirmed:

> This Court has held that a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes. Brownridge v Michigan Mut Ins Co, 115 Mich App 745, 748; 321 NW2d 798 (1982). Thus, there is no doubt that Limbach's voluntary dismissal of her cross-claim for indemnification against the OCRC precludes her from raising that claim against the OCRC again. In addition, Michigan cases have construed res judicata as applying both to claims actually raised in the prior action and to "every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not." Sprague v Buhagiar, 213 Mich App 310, 313; 539 NW2d 587 (1995). Therefore, a voluntary dismissal with prejudice acts as res judicata with respect to all claims that could have been raised in the first action. Here, the voluntary dismissal of Limbach's cross-claim against the OCRC in the Koutsouradis lawsuit operates as res judicata with respect to her claim against the OCRC in the Limbach lawsuit. [Limbach, 395-396.]

Thus, Michigan law is clear that a voluntary order of dismissal with prejudice has res judicata effect. This was clearly the intent of Dr. Douglass in agreeing to nothing less than a dismissal with prejudice. As declared by counsel for Dr. Douglass: "This case has been

decided as to him, and he is therefore protected from any further action" (Tr II, p 21, Apx 76a).

This conclusion is reinforced by MCR 2.504, which makes it clear that an order of dismissal expressly made "with prejudice," whether stipulated or involuntary, operates as an adjudication on the merits. MCR 2.504 provides, in relevant part:

> (A) Voluntary Dismissal; Effect.
>
> (1) By Plaintiff; by Stipulation. Subject to the provisions of MCR 2.420 and MCR 3.501(E), an action may be dismissed by the plaintiff without an order of the court and on the payment of costs
>
> > (a) by filing a notice of dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs; or
> >
> > (b) by filing a stipulation of dismissal signed by all the parties.
> >
> > Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a dismissal under subrule (A)(1)(a) operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim.
>
> (2) By Order of Court. Except as provided in subrule (A)(1), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.
>
> * * *
>
> > (b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice.
>
> (B) Involuntary Dismissal; Effect.
>
> * * *
>
> (3) Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits. [Emphasis added.]

The interaction of these provisions makes clear that the inclusion in an order of dismissal of the language "with prejudice" has as its consequence that the order of dismissal operates as "an adjudication on the merits." An adjudication on the merits has res judicata effect so as to bar claims actually raised in the prior action and to "every claim arising out of

the same transaction which the parties, exercising reasonable diligence, could have raised but did not." Limbach, supra.

Federal courts are in accord that a voluntary dismissal with prejudice is a judgment on the merits for res judicata purposes. See Nemaizer v Baker, 793 F2d 58, 61 (CA 2, 1986), Astron Industrial Association, Inc v Chrysler Motors Corp, 405 F2d 958 (CA 5, 1968).

B. An Order Of Dismissal With Prejudice Of An Agent Operates As Res Judicata And Precludes A Claim Against The Principal Based On The Agent's Conduct.

Michigan law is also clear that a judgment on the merits which is res judicata in favor of an agent bars a plaintiff from litigating the same cause of action against the principal under res judicata principles. DePolo v Greig, 338 Mich 703, 709; 62 NW2d 441 (1954). In DePolo, the Court held that a judgment in favor of a corporation was binding and precluded a claim against the agent. The Supreme Court premised that conclusion on the even more fundamental precept that judgment for the agent precludes, under res judicata principles, an action against the principal:

> The present case is controlled by that of Krolik v Curry, 148 Mich 214, where we said (page 222):
>
> "Where a litigant has chosen to proceed against the agents of a corporation for misconduct on their part and has been defeated, he is thereby barred from litigating the same cause of action against the principal."

The Court in DePolo quoted with approval from Bigelow v Old Dominion Copper Mining & Smelting Co, 225 US 111, 125; 32 S Ct 641; 56 L Ed 1009 (1912), the following:

> "'The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee.'" [338 Mich 711; 62 NW2d 444].

See also Schimmer v Wolverine Insurance Company, 54 Mich App 291; 220 NW2d 772 (1974).

These two principles--that a stipulated order of dismissal expressly made "with prejudice" is a judgment on the merits, and that a judgment on the merits in favor of an agent is preclusive and binding as to a claim by that same plaintiff against the principal for the agent's wrongdoing--compel the conclusion that the trial court properly dismissed River District Hospital. As a matter of both the intent of the parties expressed in the stipulation, and as a matter of law, the stipulated order of dismissal with prejudice operated as an adjudication on the merits in favor of Dr. Douglass. That adjudication on the merits therefore as a matter of law barred further litigation as to the same claim against Dr. Douglass' alleged principal, River District Hospital, for Dr. Douglass' alleged wrongdoing.

C. This Court Should Disavow Larkin v Otsego Memorial Hospital Association, Which Was Wrongly Decided And/Or Is Factually Distinguishable From This Matter.

The trial court and Judge Murray of the Court of Appeals properly concluded that Larkin v Otsego Memorial Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995), was not determinative of the issue of the effect of the stipulated order of dismissal with prejudice under the particular facts of this case. Larkin is completely distinguishable from this matter factually; as urged in the dissenting opinion by Judge, now Justice Taylor, it also was wrongly decided.

In Larkin, counsel for plaintiff and defense counsel, who represented both the hospital and the defendant physician, Dr. Kim, entered into a stipulation and order to dismiss Dr. Kim. This stipulation occurred after an admission by the hospital that there was an agency relationship between it and Dr. Kim. Larkin, 392-393. While the written stipulation and order did not expressly reserve plaintiff's claim against the hospital, "it stated that the hospital

was legally responsible for the actions of Dr. Kim, and that his dismissal was based on the hospital's acknowledgement that Dr. Kim was the hospital's agent for purposes of that case." Larkin, 396, emphasis added.

Over a vigorous dissent by Judge, now Justice Taylor, two members of the Court of Appeals panel in Larkin concluded that "[o]n the facts presented, the stipulation and order to dismiss was a covenant not to sue, not a consent judgment or a release." Larkin, supra, 394. The Court further declined to apply res judicata principles noted in Brownridge v Michigan Mutual Ins Co, supra, upon a finding that the facts in Larkin were governed by Boucher v Thomsen, 328 Mich 312; 43 NW2d 866 (1950). The Larkin majority applied Boucher in light of the parties' agreement in Larkin that the hospital was legally responsible for the actions of the agent, Dr. Kim, indicating an intent by all parties (as counsel for the hospital and the doctor were one and the same) that the hospital would continue to be held liable for the doctor. Larkin, 396.

First, defendant submits that Larkin was wrongly decided, for the reasons advanced by Judge, now Justice Taylor, in his dissent in Larkin:

> There is no meaningful distinction between the stipulated dismissal with prejudice in this case and the judgments in Felsner and Rzepka. By definition, a dismissal with prejudice constitutes a relinquishment of the suit rather than merely an agreement not to sue on an existing claim. A dismissal with prejudice is:
>
> "[a]n adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause. It is res judicata as to every matter litigated." [Black's Law Dictionary (5th ed)]
>
> Indeed, in Brownridge v Michigan Mutual Ins Co, 115 Mich App 745, 748; 321 NW2d 798 (1982), this Court held that a voluntary dismissal with prejudice is a final judgment on the merits, with res judicata effect. This Court again emphasized the meaning of a dismissal "with prejudice" in In re Koernke Estate, 169 Mich App 397; 425 NW2d 795 (1988). The Koernke Court held that because an order did not state that it was without prejudice, the order was a judgment on the merits. Id. at 400. Applying the reasoning in these cases, which have put flesh on the bones of Theophelis, and the legal definition of the

> term "dismissal with prejudice," it is apparent that the stipulation and order to dismiss with prejudice is the equivalent of a consent judgment, and, as the Court in Felsner held, a consent judgment operates as a release. [Larkin, supra, p 399, dissent by Taylor.]

Further, this matter is clearly factually distinguishable from Larkin. Here, in stark contrast to Larkin, there were no circumstances which permitted avoidance of basic jurisprudential principles of res judicata triggered by the "with prejudice" order of dismissal. In contrast to Larkin, there was here no agreement sought and entered into by counsel for the hospital, and reduced to a written stipulation and order, in which the hospital acknowledged and accepted continuing responsibility for vicarious liability for the dismissed physician.

The hospital and physician here were represented by separate counsel at trial, and for 10 months preceding trial. It was counsel for plaintiffs who unilaterally approached counsel for Dr. Douglass and proposed the voluntary dismissal with prejudice (see Tr II, p 19). This was a deliberate strategy decision by plaintiffs' counsel to ease plaintiffs' burden at trial by eliminating an additional party represented by separate counsel who would have had an independent right to separately open and close, and cross examine and present witnesses (See Tr II, pp 20, 26).

There was here no participation by counsel for the hospital in the settlement discussions or in the settlement agreement reached between counsel for Dr. Douglass and plaintiffs. Plaintiff's counsel here conceded repeatedly that his agreement was with Dr. Douglass, not with counsel for the hospital (Tr II, pp 28-30, 32, Apx 83a-85a, 87a; see also trial court at Tr II, p 32, Apx 87a, statement by hospital's counsel at Tr II, pp 9-10, Apx 64a-65a).

> THE COURT: The question I have to address is who was your agreement with. Was it with counsel for Doctor Douglass, only, or is it with counsel for Doctor Douglass and counsel for River District Hospital?

MR. KENNEY: My agreement was with Doctor Douglass's lawyer. [Tr II, p 28, Apx 83a.]

There also was here no representation or agreement by counsel for the hospital, nor any provision in the stipulation and order, in which the hospital acknowledged responsibility for the alleged agent Dr. Douglass, that could have misled plaintiffs' counsel. This is a critical distinction from the situation in Larkin, in which the stipulation and order specifically stated that the hospital was legally responsible for the actions of the physician, and that his dismissal was based on the hospital's acknowledgement that the doctor was the hospital's agent for purposes of that case. Larkin, 396.

Here the hospital never conceded and in fact vigorously asserted that it was not vicariously liable for the physician, Dr. Douglass (see complaint and answer, ¶ 19, Apx 31a-34a, statement by hospital's counsel at Tr II pp 9, 16-17, Apx 64a, 71a-72a).

> [BY COUNSEL FOR THE HOSPITAL]: With respect to his [plaintiffs'] contention that Defendant Hospital is guilty of sandbagging--sandbagging in the lowest fashion, let me state this. At no time did I give up the hospital's defenses as to agency. The agency defense is an agency [sic, defense] that exists today, has never been given up. [Plaintiffs' counsel] never spoke of it once, even in his argument now. . . . I never stipulated that Doctor Douglass is the agent of the hospital. That's the distinguishing characteristic of the Larkin case. [Tr II, pp 16-17, Apx 71a-72a].

In fact, separate representation of the hospital and Dr. Douglass was undertaken (10 months before trial) precisely to allow counsel representing the hospital to assert before the jury (without conflict in also representing the interests of Dr. Douglass) that the hospital should not be held vicariously liable for Dr. Douglass. (Dr. Douglass, while a member of the medical staff, was not employed by the hospital, creating an issue of fact as to ostensible agency under Grewe v Mt Clemens General Hospital, 404 Mich 240; 273 NW2d 429 (1978) There was here, in contrast to Larkin, supra, 396, no admission of agency or implied admission of responsibility negotiated for or incorporated into the stipulation and order

between Dr. Douglass and plaintiffs. Plaintiff's counsel conceded he was aware he had the obligation to prove agency whether Dr. Douglass was in or out of the case (Tr II, p 18, Apx 73a).

Further, as noted by Dr. Douglass' counsel, plaintiffs' counsel's unilateral oral statement of his intent that the dismissal of Dr. Douglass would not affect his claim against the hospital was never part of his negotiations or agreement with counsel for Dr. Douglass (Tr II, pp 20-21, Apx 75a-76a). It was only after the agreement had been reached and placed on the record by counsel for Dr. Douglass, that plaintiffs' counsel asserted his own, subjective intent regarding the legal impact on the hospital of the agreement with the doctor. Unlike Larkin, or Boucher v Thomsen, 328 Mich 312; 43 NW2d 866 (1950), upon which it relied, there was no agreement which effectively rendered the order a covenant not to sue rather than a dismissal with prejudice and res judicata effect.

Not only was that unilateral, subjective intent never concurred in by either counsel for Dr. Douglass or counsel for the hospital, but that unilateral, subjective intent then was never set forth in or by implication ratified in the written stipulation and order.

> THE COURT: Did anyone authorize you to have the right to continue to proceed against the hospital in the course of the entry of the order? Is there anywhere in that order that gives you the specific authorization?
>
> MR. KENNEY: No. No. *** [Tr II, p 28, Apx 83a.]

(See also Tr II, p 32, Apx 87a).

This was completely unlike the situation in Larkin, where defense counsel, who represented both the hospital and the doctor/agent, essentially solicited a dismissal with prejudice of the doctor from plaintiff's counsel with the understanding that the hospital would admit that the dismissed defendant was the hospital's agent. There was here no such inducement by counsel for either Dr. Douglass or River District Hospital. This is also unlike

Larkin in that the written stipulation and order contained no reference whatsoever to the effect on the hospital of the agreement or dismissal.

A final distinction is the fact that in Larkin, and in Boucher, upon which Larkin relied, plaintiffs and the doctor did not agree to a judgment "on the merits." Larkin, supra, 394. In Larkin, the Court specifically noted that "if the order of dismissal is on the merits, the decision is res judicata with respect to the parties" Larkin, 394-395, n 2. Here, in contrast, plaintiffs' counsel effectively conceded that the dismissal of Dr. Douglass was intended to operate as a "decision on the merits" (Tr II, pp 13-14, Apx 68a-69a).

Accordingly, Larkin v Otsego Memorial Hospital does not justify a refusal to apply fundamental principles of law here. This Court should reject Larkin and re-embrace fundamental principles of jurisprudence to hold that an order of dismissal with prejudice of an agent operates as res judicata and precludes a claim against the principal based on the agent's conduct.

II THE PRINCIPLE THAT A CONTRACTUAL RELEASE OF AN AGENT ELIMINATES THE BASIS FOR VICARIOUS LIABILITY OF THE PRINCIPAL, AS REAFFIRMED IN THEOPHELIS V LANSING GENERAL HOSPITAL, WAS NOT CHANGED BY THE 1995 AMENDMENT TO MCL 600.2925D BUT, IN ANY EVENT, THE STATUTE SHOULD HAVE NO IMPACT ON THE ISSUE HERE OF THE RES JUDICATA EFFECT OF A JUDICIAL JUDGMENT OF DISMISSAL WITH PREJUDICE.

The Court in its order granting leave to appeal has directed that the parties address whether Theophelis v Lansing General Hospital, 430 Mich 473, 485-487; 424 NW2d 478 (1988), was affected by the 1995 amendment of the contribution statute. As set forth in argument A below, defendant submits that the amendment did not alter the fundamental common law principle re-embraced in Theophelis--release of an agent releases the principal. As set forth in argument B, defendant submits, however, that this is an issue that has no direct relevance to this matter. The 1995 amendment related to contractual releases and covenants not to sue, and can have no impact on the governing principle here of the res judicata effect of an order dismissing an agent with prejudice.

A. The Principle That A Contractual Release Of An Agent Eliminates The Basis For Vicarious Liability Of The Principal, As Reaffirmed In Theophelis v Lansing General Hospital, Was Not Changed By The 1995 Amendment To MCL 600.2925d.

(1) Evolution of the contribution statute and Theophelis v Lansing General Hospital.

Prior to 1974, MCL 600.2925 governed "contribution between joint tortfeasors" as its title reflected, and provided, in MCL 600.2925(2) that it was lawful for any person to settle with one joint tortfeasor before judgment without impairing the right to contribution from remaining tortfeasors. See Theophelis v Lansing General Hospital, 430 Mich 473, 485-487; 424 NW2d 478 (1988).

In 1974, MCL 600.2925 was repealed and replaced with MCL 600.2925a-600.2925d. The first section, MCL 600.2925a provided (as it still does) in relevant part, as follows:

(1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability.

* * *

(7) This section does not impair any right of indemnity under existing law. Where 1 tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

The second section, MCL 600.2925d, as amended in 1974, read:

When a release or covenant not to sue or to enforce judgment is given in good faith to 1 of 2 or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide.

(b) It reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.

(c) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor. [MCL 600.2925d]

In Theophelis v Lansing General Hospital, 430 Mich 473; 424 NW2d 478 (1988), the Supreme Court held that the 1974 amendments to the Michigan contribution statute did not abrogate the common law rule that settlement with and release of, an agent operates to discharge the principal from vicarious liability from the agents acts. The Court rejected the plaintiff's argument there that MCL 2925d(a) even applied, reasoning, only in part, that in a vicarious liability situation, a principal is not a "tortfeasor" to whom application of section 2925d was limited.

In 1995, the Legislature amended MCL 600.2925d in 1995 PA 161 which, along with 1995 PA 249, were tort reform measures that established liability in most, but not all actions "based on tort or another legal theory seeking damages for personal injury. . . " to be several rather than joint (Exceptions included most medical malpractice actions, and actions in which the actor was guilty of certain crimes, see MCL 600.2956, MCL 600.6304, MCL 600.6312.)

Consistent with the application of other provisions of the Acts to apply not only to tort actions but to actions based on any legal theory for damages, the 1995 amendment to MCL 600.2925d removed any reference to "liable in tort" or "tortfeasor" to provide:

> If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death, both of the following apply:
>
> (a) The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.
>
> (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

(2) The 1995 amendment to MCL 600.2912d did not alter the fundamental common law principle, reaffirmed in Theophelis v Lansing General Hospital, that release of an agent destroys the basis for imputing liability to the principal.

Defendant submits that the amendment to MCL 600.2912d did not alter the fundamental common law principle that release of an agent releases the principal. The analysis of Theophelis focused only in part on the import of the word "tortfeasor" in the 1974 act. The elimination of that term does not abrogate the doctrine, given (1) the remainder of the rationale in Theophelis, (2) the full context of the 1995 amendments, as well as (3) other considerations the Court did not need to reach or address in Theophelis given the narrow scope of the plaintiff's argument and the Court's analysis.

Where, as here, liability is premised on pure vicarious liability of a principal for acts of an alleged agent, an agent and principal cannot fairly be considered separate ("2 or more")

"persons" which is the condition precedent to application of the provisions of MCL 600.2925d(a) and (b). Rather, there is a "'practical identity'" created by law between a principal and its agents where as here the basis of liability is pure vicarious liability. Cox v Flint Bd of Hosp Mgrs, 467 Mich 1; 651 NW2d 356 (2002). In Cox, supra, the Court described the principles underlying hospital liability in a medical malpractice action such as this:

> Vicarious liability is "indirect responsibility imposed by operation of law." Id. at 483. As this Court stated in 1871:
>
> [T]he master is bound to keep his servants within their proper bounds, and is responsible if he does not. The law contemplates that their acts are his acts, and that he is constructively present at them all. [Smith v Webster, 23 Mich 298, 299-300 (1871) (emphasis added).]
>
> In other words, the principal "is only liable because the law creates a practical identity with his [agents], so that he is held to have done what they have done." Id. at 300. See also Ducre v Sparrow-Kroll Lumber Co, 168 Mich 49, 52; 133 NW 938 (1911). [Emphasis added]

In Nippa v Botsford Gen Hosp (On Remand), 257 Mich App 387; 668 NW2d 628 (2003), the Court of Appeals applied these principles in interpreting the malpractice expert witness qualification statute to hold that the term "party" in MCL 600.2169(1)(a) encompasses the agents for whose alleged negligent acts the hospital may still be liable:

> All procedural requirements are applicable to the hospital in the same manner and form as if the doctor were a named party to the lawsuit. This is so because the law creates a practical identity between a principal and an agent, and, by a legal fiction, the hospital is held to have done what its agents have done. Id. It would be absurd to have one set of legal rules for a hospital and another set of legal rules for its agents.

Where the "principal is held to have done what the agent has done," and the "law contemplates that the agent's acts are the principal's acts" and that the principal "'is constructively present at them all,'" Cox, supra, the principal and agent cannot be considered "2 or more persons" within the meaning of MCL 600.2925d.

This is entirely consistent with Theophelis. The Court's analysis in Theophelis also turned on the import of the declaration in the section of the contribution statute proceeding MCL 600.2925d, specifically MCL 600.2925b(b) that, in determining the pro rate share for purposes of contribution, if equity requires, "the collective liability of some as a group shall constitute a single share." The Court reasoned:

> Second, it [the Act] invokes the rule of equity which requires class liability, including the common liability arising from vicarious relationships, to be treated as a single share. For instance the liability of a master and servant for the wrong of the servant should in fairness be treated as a single share. Other examples are those situations involving co-owners of property, members of an unincorporated association, those engaged in a joint enterprise and the like. ...
>
> Put in another context, if A, B, and C are sued because each is guilty of negligence which resulted in injury to a plaintiff, their pro-rata shares of the common liability are to be determined under the contribution statute without regard to whether A's principal, not a wrongdoer, is also joined as a fourth defendant. As between A, an agent, and his principal, there is only one tortfeasor, and they represent only one share of the common liability. [Theophelis v Lansing General Hospital, 430 Mich 473, 490-491; 424 NW2d 478 (1988).]

In ascertaining the legislative intent in a statute, the statutory provisions must be read as a harmonious whole. Bailey v Oakwood Hospital and Medical Center, 472 Mich 685; 698 NW2d 374 (2005). As the directive in MCL 600.2925b(b) that, in determining the pro rate share for purposes of contribution, "the collective liability of some as a group shall constitute a single share" remained unchanged by the 1995 act, this analysis by the Court in Theophelis continues to apply. Whether the term used is "tortfeasor" or "person," there is only one entity to be considered in the context of principal and agent, and they together represent only one share of the common liability.

The Court's analysis in Theophelis also turned on the very different manner in which a release operated for purposes of vicarious liability on the one hand, and with respect to joint tortfeasors on the other. At common law, release of one joint tortfeasor automatically

released other tortfeasors. Theophelis, supra, 482. This, however, was distinct in nature from the effect of a release in an agent and principal context. In this context, the release of one does not merely "discharge" the other, the release of the agent destroys as a matter of common law very basis in tort law upon which the principal's liability, if any, could be premised in the first instance. As the Court in Theophelis explained:

> However, common-law rules which once governed contribution rights among joint and concurrent tortfeasors should not be confused with the deeply rooted common-law doctrine that release of an agent discharges the principal from vicarious liability. The rationale for the latter rule is entirely different and is grounded on the very nature of the principal's derivative liability.
>
> Vicarious liability is indirect responsibility imposed by operation of law. [Id., 482.]

Carrying this analysis further, as the Court in Theophelis concluded in holding that the contribution statute did not affect the common law doctrine that release of an agent extinguishing the agent's liability continued to operate to destroy the basis of the principal's vicarious liability: "Any other result would be illogical and unjust because release of the agent removes the only basis for imputing liability to the principal." Id., 491. Thus the release of the agent does not merely "discharge" the principal (to which section 600.2925a is directed), but destroys the very common law basis for vicarious liability.

Furthermore, the clear intent of MCL 600.2925d is that by settling with the plaintiff, litigation is to end with respect to the settling person ("The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death). However, a settling agent, while free from claims for contribution, would remain liable for an indemnification claim by a principal, should the plaintiff then proceed and recover against the principal. This would clearly and impermissibly frustrate a goal of the contribution act--the early and final settlement of claims, see Mayhew v Berrien County Road

Commission, 414 Mich 399, 411-412; 326 NW2d 366 (1982). As explicitly recognized by the Court in Theophelis:

> Some courts have concluded that to hold a principal liable despite his agent's release would frustrate a second goal of the contribution act, i.e., the early and final settlement of claims. Because the act preserves the right of indemnity, see § 2925a(7), it is argued that such a result actually spawns litigation and leads to circuity of action. See 24 ALR4th 547, 552, 567. The possibility of indemnity actions has been at least recognized in Craven v Lawson, 534 SW2d 653, 656 (Tenn, 1976); Ritter v Technicolor Corp, 27 Cal App 3d 152, 155; 103 Cal Rptr 686 (1972); Swanigan v State Farm Ins Co, 99 Wis 2d 179, 201-203; 299 NW2d 234 (1980); Van Cleave v Gamboni Const Co, 101 Nev 524, 528-529; 706 P2d 845 (1985). [Theophelis v Lansing General Hospital, 430 Mich 473, 489 n 13; 424 NW2d 478 (1988).]

Moreover, in the context of pure vicarious liability between the tortfeasor and the innocent principal, a release of an agent that does not also resolve a potential vicarious liability claims against a faultless principal and would leave the principal to fact claims asserted by a plaintiff would not fairly be in "good faith" for purposes of application of MCL 600.2912d. That is, application of both of MCL 600.2912d's provisions regarding discharge of other persons and or claims for contribution are conditioned on the release having been given "in good faith." The purpose and policy of the contribution statute and the nature of vicarious liability are such that a release of an "at-fault" and (here merely "apparent" agent), could never be given in "good faith" where the plaintiff attempts to reserve the right to proceed against the faultless principal for precisely the same conduct for which plaintiff has already received compensation. In Bristow v Griffitts Constr Co, 140 Ill App 3d 191; 488 NE2d 332, 338 (1986), the Court so reasoned regarding similar language in the Illinois contribution act:

> We fail to see how the plaintiffs could in good faith settle with the employee, who is allegedly the sole party at fault, and still seek additional damages from the employer. If an additional recovery were necessary, then the settlement could not possibly reflect the employee's pro rata share of culpability. Applying the Act in situations where one party's liability is derivative would be repugnant to the central purpose of the Act.

> Section 2(c) was designed to encourage settlements. Because we find an action for indemnity remains viable in cases involving vicarious liability, the employee in this case would gain nothing in return for his $20,000 and relinquishing his right to defend unless the covenant not to sue also extinguished the employer's vicarious liability.

Furthermore, by its terms, MCL 600.2925d, as amended, presupposes the existence of a potential claim for contribution and this only applies in a context where contribution is a possibility. For 2926d(b) to apply, as the leading paragraph says it must, the release must have the effect of discharging the person to whom it is given for liability for contribution. The right of contribution, however, exists only in favor of a "tort-feasor" who has paid more than his pro rata share. As between Dr. Douglass and the hospital, however there is no potential for contribution, as the hospital's liability was purely vicarious. In such a case the only basis of liability would be indemnity. However, in MCL 600.2925a, the Legislature declares clearly that where there is a right to indemnity, contribution has no application.

B. Alternatively, The Impact, If Any, Of The Amendment Of The Contribution Statute On Private Release Agreements Should Have No Impact Upon The Issue Here Of The Res Judicata Effect Of A Judicial Judgment Of Dismissal With Prejudice, The Actual Basis Upon Which The Dismissal Of River District Hospital Was Sought, And Granted.

The express ground upon which River District Hospital sought, and upon which the trial court granted, summary disposition was the res judicata effect of the order of dismissal of Dr. Douglass "with prejudice." The trial court ruled: "The decision to dismiss Dr. Douglass with prejudice is res judicata as to any liability against River District Hospital." (Tr II, pp 8-10, 34, Apx 64a-65a, 3a). The amendment to the contribution statute, MCL 600.2925d, is directed to the effect of a "release or a covenant not to sue or not to enforce judgment," an issue separate and distinct from that of res judicata.

The common law release doctrine and the doctrine of res judicata share a similar policy basis--limiting multiplicity of claims and suits. See Larkin v Otsego Memorial

Hospital Association, 207 Mich App 391; 525 NW2d 475 (1995)(dissent by Judge, now Chief Justice Taylor). However, they are two separate doctrines subject to separate analysis and governing principles. See e.g., Adair v State of Michigan, 470 Mich 105; 680 NW2d 386 (2004) (addressing and analyzing separately claimed defenses of res judicata and release). Even assuming arguendo the 1995 amendment of MCL 600.2925d would affect the impact of a contractual release in a vicarious liability circumstance, the statute can and should have no impact on the issue of the res judicata effect of a court judgment. The doctrine of res judicata rests on fundamental principles of jurisprudence and procedure the statute does not purport to, and cannot, alter.

In construing a statute, a court must give effect to the purpose of the Legislature according to the common and ordinary meaning of the statutory language. Bailey v Oakwood Hospital and Medical Center, 472 Mich 685; 698 NW2d 374 (2005). According to their common and ordinary meaning, a "release" or a "covenant not to sue" or not to enforce judgment are simply agreements between private parties, that in no way implicate the involvement of a court. A release "is a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised. 66 Am Jur 2d Release, 1. A "covenant not to sue" is "an agreement not to sue on an existing claim." Id. § 4.

Res judicata, on the other hand is a fundamental, judicially created doctrine affecting the finality of a court's own judgments. Literally, "res judicata" means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." 46 Am Jur 2d Judgments, § 514.

> Res judicata is not a mere matter of practice or procedure inherited from a more technical time, but a rule of fundamental and substantial justice, of public policy and private peace, which should be enforced by the courts to the end that rights, once established by the final judgment of a court of competent

> jurisdiction must be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect.
>
> The doctrine of res judicata is a manifestation of the recognition that endless litigation leads to confusion or chaos. [46 Am Jur 2d Judgments, § 515.]

This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. Adair v State of Michigan, 470 Mich 105; 680 NW2d 386 (2004).

Given the plain and ordinary meaning of the terms "release" and "covenant" as used in MCL 600.2925d, there can be no legislative intent to invade the province of the judiciary in terms of the res judicata effect of orders of a court, or to in any way impair the operation of MCR 2.504.

III THE COURT OF APPEALS MAJORITY CLEARLY ERRED IN CONCLUDING, ALBEIT FOR ENTIRELY DIFFERENT REASONS, THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO SET ASIDE THE STIPULATED VOLUNTARY ORDER OF DISMISSAL WITH PREJUDICE FOR EITHER FRAUD OR MISTAKE: NEITHER FRAUD NOR MISTAKE WAS SO CLEARLY ESTABLISHED ON THIS RECORD AS TO PERMIT THE COURT OF APPEALS TO INTERFERE WITH THE TRIAL COURT'S EXERCISE OF DISCRETION.

A trial court's decision whether to set aside an order under MCR 2.612 is reviewed for an abuse of discretion. Limbach v Oakland Board of Road Commissioners, 226 Mich App 389, 392-393; 573 NW2d 336 (1997). Contrary to the conclusion (for different reasons) by two judges of the Court of Appeals, there is not a basis in law or in this record upon which it could be found that Judge Daniel Kelly abused his discretion in denying plaintiffs' request that the order of dismissal with prejudice implementing the agreement with Dr. Douglass sought and pursued by plaintiffs' counsel be set aside under MCR 2.612(C).

The order which plaintiffs sought to set aside here was not merely an order entered by the court intended to adjudicate the merits of the claim against Dr. Douglass. Rather, it was an order entered pursuant to a voluntary agreement initially proposed and sought by plaintiffs (and not by the defendant hospital), and confirmed on the record before the court. In order to set aside that negotiated order, then, plaintiffs were required to establish both grounds to set aside their agreement with Dr. Douglass, and grounds to set aside the order of the court implementing that agreement, and that the trial court abused its discretion in declining to set both aside. This, plaintiffs failed to do, and the two judges of the Court of Appeals erred in concluding reversal was permissible.

A. Where Two Judges Of The Court Of Appeals Could Not Agree As To The Basis Upon Or Rule Under Which The Trial Court Should Have Set Aside The Order Of Dismissal With Prejudice, There Cannot Have Been An Abuse Of Discretion By The Trial Court In Declining To Do So.

In the first opinion for reversal, Judge Gage concluded that Judge Daniel Kelly abused his discretion in declining to set aside the judgment under MCR 2.612(C)(1)(a)(c) and/or (d). Judge Gage concluded that there was a mistake of plaintiff's counsel "with respect to the effect of the written stipulation," and, apparently "fraud" by Mr. Ralph Valitutti, counsel for the hospital, on the trial court and/or opposing counsel in this adversarial proceeding.

In the second opinion for reversal, Judge Kelly concluded that Judge Daniel Kelly abused his discretion in failing to set aside the stipulation, and order, because of a "clerical mistake," under MCR 2.612(A) (although no request was ever made by plaintiff on this ground, either below or on appeal.)

Defendant submits that the Court of Appeals in the two opinions for reversal failed to appropriately apply the abuse of discretion standard of review to the question of whether the order of dismissal with prejudice should be set aside. The Court clearly exceeded its authority both to defendant's substantial prejudice and in violation of this Court's mandated standard of review.

Where there has been a valid exercise of discretion, appellate review is sharply limited. Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 227; 600 NW2d 638 (1999). Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside. Id. In Alken-Ziegler, Inc, the Court, in application of the abuse of discretion standard of review to reinstating a trial court's decision refusing to set aside a default in which the Court of Appeals sought to set aside, reaffirmed that standard:

> An abuse of discretion involves far more than a difference in judicial opinion. Williams v Hofley Mfg Co, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is "'so palpably and

> grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'"
>
> ***
>
> This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters.

See also AMCO Builders & Developers, Inc v Team ACE Joint Venture, 469 Mich 90; 666 NW2d 623 (2003), again affirming a trial court's determination refusing to set aside a default, and reversing the Court of Appeals interference with that exercise of discretion.

To warrant interference by the Court of Appeals in a matter so entirely in the sound discretion of the circuit court as the granting or refusing of a motion to set aside the judgment under MCR 2.612(A) or (C), "'the abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made.'" Alken-Ziegler, supra, 228. Where not even two members of the appellate court can agree upon basis upon which the judgment should be set aside, the trial court's refusal to do so logically cannot be an abuse of discretion. Further, as set forth below, the bases stated in the opinions do not as a matter of law or fact establish an abuse of discretion by the trial court.

B. The Court Of Appeals In The Lead Opinion For Reversal Clearly Erred In Finding On This Record And Under Michigan Law That There Was Both Such "Fraud" By Mr. Ralph Valitutti, Counsel For The Hospital, In Failing To Act As An Advocate For Opposing Counsel And/Or Such "Mistake" By Counsel For Plaintiffs, That The Denial Of Relief Under MCR 2.612(C) Was An Abuse Of Discretion.

The Court of Appeals in the lead opinion concluded (evidently) that there was such "fraud" by attorney Ralph Valitutti (or counsel for Dr. Douglass) on the trial court as well as (apparently) on opposing counsel, and such "mistake" by plaintiffs' counsel within the meaning of MCR 2.612(C), that the trial court abused its discretion and had no rational choice

but to set aside the order. This, according to the Court, was because (1) Mr. Valitutti did not advise the trial court and plaintiffs' counsel, at the time of the announcement of the verbal settlement agreement between Dr. Douglass and plaintiffs, that the hospital did not agree with plaintiffs' counsel's unilateral declaration of his unilateral understanding of the legal effect of that agreement with the doctor on his claims against the hospital, and (2) "defendants' counsel" failed to include, or correct plaintiffs' counsel mistake in failing to include, in the proposed draft written stipulation and order a statement of plaintiffs' counsel's declared unilateral, and erroneous, understanding of the legal effect on the hospital of the agreement with Dr. Douglass.

Defendant submits, respectfully, that this analysis is premised on factual speculation and assumptions unsupported by the record. It further is premised on a misapplication of the law pertaining to fraud and mistake which is fundamentally inconsistent with counsel's ethical obligation to his client. The accusations in this opinion are clearly erroneous and will cause material injustice to the Hospital and its counsel in this and future representation. Further, questions of counsel's obligations to an adversary in litigation is one of jurisprudential significance deserving of clarification by the Court.

(1) There was not "fraud" within the meaning of MCR 2.612.

A fraud which warrants equity interfering with a judgment must be fraud in obtaining the judgment, and the fraud must be positive and not merely constructive. Grigg v Hanna, 283 Mich 443; 278 Mich 443 (1938). Fraud is perpetrated on the court when some material fact is concealed from the court or when some material misrepresentation is made to the court. DeHaan v DeHaan, 348 Mich 199; 82 NW2d 432 (1957). The proof required to sustain a motion to set aside a judgment because of fraud is "of the highest order." Kiefer v Kiefer, 212 Mich App 176; 536 NW2d 873 (1995).

On the record before the Court of Appeals it is, defendant submits, absolute error to assume the existence of fraud by Mr. Valitutti, counsel for River District Hospital. This is particularly so where the trial judge himself who was present to view the demeanor of counsel, and to experience the unfolding of events in chambers first hand, explicitly determined there was no fraud on the court:

> Further, there is no credible evidence that the dismissal was understood by the doctor to be merely a covenant not to sue. At the same time, the record is also very clear that counsel for plaintiff never intended to waive his right to pursue vicarious liability claims against River District Hospital. Unfortunately for plaintiffs it has had that legal effect.
>
> Silence in the face of plaintiff's counsel's declaration of intent does not amount to an agreement. The attorneys for the defendants owed their duty only to their clients. Further, I am of the opinion that the relief being sought under MCR 2.612 is not justified under the facts of this case. Any mistake made is a mistake of law and not of fact. [Tr II, pp 35-36, Apx 90a-91a].

The evident determination by the Court of Appeals in the first opinion that there was fraud on plaintiffs' counsel because "plaintiffs' counsel trusted that counsel for defendants' would accurately prepare the stipulation and order," and defendants' counsel presented to plaintiffs' counsel "a written stipulation, drafted by defendants' counsel, that omitted the entire oral agreement" (Opinion p 7), is in error.

First, it is, defendant submits, an extraordinary suggestion that an attorney in an adversarial litigation proceeding can blindly rely on an opponent to include in any document any provision, sign that agreement, and then secure the vacating of that agreement or order as "fraudulent" upon a protestation that the adversary failed to include the full agreement!

A party that signs a contract may not avoid enforcement of the contract because they failed to read or understand the included terms. Farm Bureau Mutual Ins Co v Nikkel, 460 Mich 558, 557; 596 NW2d 915 (1999). Here, however, there has been no suggestion that plaintiffs' counsel did not read or understand the one sentence stipulation, or the two-sentence

order. Upon being presented with the draft stipulation and order for review after lunch, plaintiff's counsel "took it out to confer with his co-counsel." (Tr 4/17/02, pp 20-21.)

No agreement to allow plaintiffs to continue to assert their claim of vicarious liability was ever solicited from counsel for the hospital. Instead, the only writing presented to counsel for the hospital was the written order which was entered.

As a matter of law, agreements may not be assumed. MCR 2.507(H) teaches, and limits the same to:

> (H) Agreements to Be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Counsel for the hospital did not prepare the agreement; he was just asked to sign it.

Furthermore, the trial court's statement that it understood plaintiffs' intent and was sure "they", i.e., Dr. Douglass and his counsel, did as well, occurred in a context which did not suggest to counsel for the hospital any reason or need to interject to advise the court whether the hospital's counsel agreed with plaintiffs' counsel's statement of intent regarding the effect of the settlement agreement by plaintiff with Dr. Douglass. At the time, the judge was in chambers with counsel and their clients; the judge was turning to each of the assembled groups, inquiring of each counsel regarding their own client's settlement stipulations and offers (Tr I, pp 6-7, Apx 40a-41a). The court began its inquiry with Mr. and Mrs. Stamplis and their counsel, and then turned to counsel for Dr. Douglass (Id., pp 8-9, Apx 42a-43a).

The statement by the trial court regarding understanding the plaintiffs' intent followed and was specifically with reference to plaintiffs and Dr. Douglass, and their comments regarding their separate understandings of their specific agreement (Id., p 10, Apx 44a). The

court then turned to Mr. Valitutti, counsel for the hospital, to place on the record his client's settlement position, which Mr. Valitutti did, making an offer of $300,000 (Id, pp 10-11, Apx 44a-45a). The hospital was not a party to or involved in the settlement agreement between the doctor and plaintiffs, and had no reason to comment on the same at the time. Further, this was not in the context of a courtroom setting, nor were counsel expected or permitted to engage in legal argument.

There was no fraud by counsel for the hospital or counsel for Dr. Douglass. There was effective advocacy by hospital counsel in refusing to rely upon his opponent's representation of the legal effect of the other parties' actions, in researching the issue and then in moving based on that research to protect his client's rights to the fullest extent. There was effective advocacy by hospital counsel in refraining from educating one's opponent about potential legal arguments which could be raised in zealous advocacy in support of his client's position. There was effective advocacy by counsel for Dr. Douglass in declining to unilaterally include in the stipulated order of dismissal terms to which the doctor had not agreed.

The duty of the first opinion of the Court of Appeals would impose on counsel for the hospital to avoid the label of "fraud" would require counsel to act in contravention of his legal and ethical obligations to represent vigorously the interests of his client in this adversarial proceeding against a party represented by competent counsel.

The Michigan Rules of Professional Conduct require counsel to represent his client "with diligence." MRPC 1.3. As the Comment to Rule 1.3 states, counsel should "take whatever lawful and ethical measures are required to vindicate his client's cause," and act with "zeal in advocacy upon the client's behalf." The Rules prohibit counsel from making a false

statement of material fact or law to the tribunal or any person. Rule 3.3(a) "Candor Toward The Tribunal") and Rule 4.1 ("Truthfulness in Statements To Others").

The Rules, however, do not impose an affirmative duty to disclose even material facts to a tribunal except in an ex parte proceeding. Rule 3.3(d). Likewise, the Rules impose on counsel an affirmative obligation to disclose law to a tribunal only with respect to "controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (Emphasis added.) As the Comment to the rule notes: "Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party" except in an ex parte proceeding.

In light of these principles under which counsel for the hospital, Mr. Ralph Valitutti, was obliged to conduct himself, the failure to advise opposing counsel or the court that he would be arguing that opposing counsel's statement of the legal effect of his agreement was not correct could not be improper, let alone rise to the level of "fraud" on court or opposing counsel. As stated in Matley v Matley (On Remand), 242 Mich App 100; 617 NW2d 718 (2000), "A fraud is perpetrated on the court when some material fact is concealed from the court or some material misrepresentation is made to the court." However, in Matley, the Court held in light of MRPC 3.3, that fraud cannot be committed on the Court in an adversary hearing with respect to facts not known by the court, but known to both parties.

> If an advocate generally has the responsibility to present only one side of the matters at issue, then a party cannot commit fraud on the court by failing to disclose to the court facts that are adverse to his position where the facts are known by the opposing party.
>
> Here, both parties were represented by counsel at the arbitration hearing. Therefore, defendant and his attorney had "the limited responsibility of presenting one side of the matters that a tribunal should consider" to make its decision. MRPC 3.3. While it is inequitable, and contrary to the divorce judgment, that plaintiff was required to make the lease and insurance payments

> for the months the Honda was not in her possession, it was plaintiff's responsibility to correct any incorrect statement of fact or omission of fact made by defendant during the arbitration proceedings and to inform the court that the Honda had not been in her possession since March 1993. She had the opportunity to do so in her arbitration brief and at the arbitration hearing, where she was represented by counsel.

This reasoning compels the conclusion that there cannot as a matter of law be fraud on the court, or on one's opposing counsel in an adversary proceeding, by failing to warn the court or counsel in advance of the legal pitfalls of an announced strategy by opposing counsel.

Further, the declaration in the first opinion of the Court of Appeals that "the written stipulation did not reflect what was agreed to by plaintiffs or Dr. Douglass" is patently incorrect. There is nothing in the record to establish that plaintiffs' counsel's unilateral expression of his intent as to the legal impact of the dismissal was in fact agreed to by Dr. Douglass and part of their agreement! To the contrary, Dr. Douglass' counsel repeatedly denied any such agreement. It could not be fraud to fail to include in the written embodiment of the parties' agreement a term upon which there in fact was no meeting of the minds. As was reiterated in Komraus Plumbing & Heating, Inc, v Cadillac Sands Motel, Inc, 387 Mich 285, 290; 195 NW2d 865 (1972) "'To hold that a party may reply to an action upon a written instrument, "It is true I made the contract, but it was not my agreement, and I did not intend to be bound by it," would set the law of contracts all afloat, render the certainty of the law a fiction, and place the obligations of parties beyond judicial control.'"

Without merit was plaintiffs' reliance below on decisions addressing a claim of "silent fraud," e.g., US Fidelity and Guaranty Co v Black, 412 Mich 99; 313 NW2d 77 (1981), Hord v Environmental Research Institution, 463 Mich 399; 617 NW2d 543 (2000). Michigan law remains clear that mere nondisclosure is insufficient to establish fraud. Hord, supra. "[M]ere nondisclosure is insufficient. There must be circumstances that establish a legal duty to make a disclosure." Hord, supra.

While the Court in Hord did note that "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff to which the defendant makes incomplete replies that are truthful in themselves but omit material information," such is not the situation here. As was the case in Hord, there was in fact no evidence either that plaintiffs made any inquiry, or that there was an incomplete response by defendants to plaintiffs:

> There was no evidence that the plaintiff made any inquiry about the financial condition of the company in general or requested updated financial data in particular. The information was provided with a number of other basic documents about the defendant, and was not in response to any request for information by the plaintiff. [Hord, supra.]

There is no evidence, nor even an allegation, that either counsel for Dr. Douglass or counsel for River District Hospital made any representation to plaintiffs whatsoever regarding the legal effect of that agreement or of the order of dismissal with prejudice, either before plaintiffs' counsel proposed this scheme, or prior to the motion for summary disposition.

Finally, the hospital submits that it would be inappropriate to extend the doctrine of "silent fraud" to the adversarial arena of litigation, and to communications by counsel charged with the duty to act as advocates on behalf of their clients. Plaintiffs' argument below that the failure of counsel for the hospital or counsel for Dr. Douglass to advise plaintiffs' counsel that they disagreed with him regarding the legal effect of the agreement between plaintiff and Dr. Douglass, which had already been reached, constituted fraud under MCR 2.612(1)(c) is patently without merit. Such silence regarding hospital counsel's belief as to the legal effect of an agreement already reached between co-counsel cannot constitute fraud sufficient to set aside an order entered pursuant to agreement of the parties under MCR 2.612.

It also must be kept in mind that this proposal was made by plaintiffs' counsel, not out of charity, but out of a deliberate trial strategy to gain advantage at the time of trial. By

voluntarily dismissing Dr. Douglass, plaintiffs' counsel sought to reduce the effectiveness of the defense by eliminating one of the defendants so as to face counsel for two, not three. Plaintiffs' counsel further likely sought the advantage of eliminating the last individual defendant and leaving before the jury the grievously disabled and sympathetic plaintiff facing the faceless, and deep-pocketed, corporate defendants. The hospital, on the other hand, was left without the presence and assistance of the very individual for whose conduct it was sought be held liable. Further, in this particular case, the hospital potentially was left without the benefit, as co-counsel, of the attorney who previously had represented the hospital and who, more importantly, had firsthand knowledge of the history and discovery in this four-year-old lawsuit.

The Court of Appeals clearly exceeded its authority as a reviewing court subject to an abuse of discretion standard of review in concluding that, contrary to the findings of the trial court judge, there had been "fraud" by defendants' counsel.

(2) There was not "mistake" within the meaning of MCR 2.612.

There was no "mistake" sufficient to not merely allow, but require the order to be set aside under MCR 2.612(C)(1)(a). In Haberkorn v Chrysler Corporation, 210 Mich App 354, 382; 533 NW2d 373 (1995), the Court refused to disturb the trial court's refusal to set aside an award of case evaluation sanctions under MCR 2.612 for the same reasons employed by the trial court here:

> Plaintiffs clearly intended to reject both the mediation evaluation and defendant's offer to settle. Plaintiffs' error was in assessing the consequences of their choice. This type of mistake is insufficient to furnish a basis for relief under MCR 2.612(C)(1).

In Limbach v Oakland County Road Commissioners, plaintiff asserted a mistake by their counsel with respect to the legal effect of an agreement to dismiss a cross-claim "with prejudice," virtually identical to that here. The Court of Appeals held that such a claim did

not permit it to find an abuse of discretion by the trial court in declining to set aside the stipulated order under MCR 2.612. The Court declared:

> This type of mistake might be sufficient to allow a trial court to grant relief from judgment [citation omitted]. However, it is not the type of mistake warranting reversal of a trial court's denial of relief. See Hauser v Roma's of Michigan, Inc, 156 Mich App 102, 105-106; 401 NW2d 630 (1986). Indeed, MCR 2.612(C)(1)(a) was not 'designed to relieve counsel of ill-advised or careless decisions.' Lark v Detroit Edison Co, 99 Mich App 280, 283; 297 NW2d 653 (1980). [Limbach, 393, footnote omitted].

While even assuming, as the Court in Limbach suggested, that a stipulation may be set aside where there is evidence of mistake, fraud, or unconscionable advantage, an alleged mistake as to the legal effect of a stipulated dismissal with prejudice is "unilateral and would not justify putting aside or modifying the stipulation." Limbach, 394.

Defendant further submits that the "mistake" by plaintiff's counsel cannot upon principled application of precedent entitle plaintiff to appellate relief from the judgment. As the Court of Appeals notes, it held in Limbach, supra, that: "Indeed, a stipulation is a type of contract, and contract defenses are available to a party who seeks to avoid a stipulation." However, Eaton County Board v Schultz, 205 Mich App 371; 521 NW2d 847 (1994), also cited in Limbach in support, prohibits the lead opinion's further conclusion that the mistake of plaintiff's counsel, whether factual or legal, entitled him to relief. The parties could not make a binding stipulation of law. In Eaton, 379, the Court declared:

> Our Supreme Court has distinguished between stipulations of fact, which are binding, Dana Corp v Michigan Employment Security Commission, 371 Mich 107 (1963) and stipulations of law which are not binding." In Re Finley Estate, 430 Mich 590. [Eaton, 379.]

On the other hand, a stipulation of fact, however erroneous, is binding. In Dana Corp v Michigan Employment Security Commission, 371 Mich 107; 123 NW2d 277 (1963), the Court declared:

> Once stipulations [of fact] have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them. This holder requires no supporting citation. The necessity of the rule is apparent. A party must be able to rest secure on the premise that the stipulated facts and the stipulated ultimate conclusionary facts as accepted will be those upon which adjudication is based. Any deviation there from results in a denial of due process for the obvious reason that both parties by accepting the stipulation have been foreclosed from making any testimonial or other evidentiary record.

Plaintiffs' counsel's mistake here, be it of fact or law, was unilateral and thus "was not the type of mistake warranting reversal of a trial court's denial of relief." Limbach, supra, 393, 394. Plaintiffs have failed to demonstrate the existence of facts which would compel the setting aside of a stipulated agreement between plaintiffs and Dr. Douglass--a contract binding under MCR 2.507(H) and common law contract principles. Plaintiffs have also failed to demonstrate mutual mistake, fraud or unconscionable advantage as required to void a contract. See Meyer v Rosenbaum, 71 Mich App 388; 248 NW2d 558 (1976), Pedder v Kalish, 26 Mich App 655; 182 NW2d 739 (1970).

The first opinion of the Court of Appeals clearly misapplied fundamental principles of Michigan jurisprudence to find "mistake" here sufficient to warrant interference with the trial court's exercise of discretion.

C. The Court Of Appeals In The Second Opinion For Reversal Has Clearly Erred In Finding On This Record And Under Michigan Law That There Was Such A "Clerical Mistake," That Judge Daniel Kelly Committed An Abuse Of Discretion In Declining To Set Aside The Parties' Stipulation, And Judge Kelly's Order Of Dismissal With Prejudice Pursuant To MCR 2.612(A), Which Had Never Been Cited Or Relied Upon By Plaintiffs Below Or On Appeal.

In the second opinion for reversal, Judge Kelly concluded that the trial court "abused its discretion in denying plaintiffs' request for relief from judgment under MCR 2.612(A)(1) on the basis of a "clerical mistake in the order dismissing Dr. Douglass." Defendant submits that this conclusion was in error, first, because plaintiffs had never argued there was a

"clerical error" or sought relief under MCR 2.612(A), below or on appeal. Surely, a trial judge should not be held to have committed an "abuse of discretion" for failing to sua sponte grant relief on a ground never advanced by a party.

Further, had the issue been raised below and on appeal, it would not have been an abuse of discretion for the trial court to have declined to have granted relief. MCR 2.612(A)(1) provides:

> Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

The purpose of MCR 2.612(A)(1) is to make the lower court record and judgment accurately reflect what was done and decided at the trial level. McDonald's Corporation v Canton Township, 177 Mich App 153; 441 NW2d 37 (1989). The rule improperly would be applied here to amend the order of the trial court to reflect what plaintiffs' counsel unilaterally had intended to do, not what was actually agreed to by the parties, or intended by the trial court.

In Grettenberger Pharmacy, Inc v Blue Cross-Blue Shield of Michigan, 120 Mich App 354; 296 NW2d 589 (1982), the Court summarized the purpose of the rule allowing revision of an order because of "clerical error".

> "* * * to make the lower court record and judgment accurately reflect what was done and decided at the trial level. When the alleged error is in the court's action itself, as distinguished from the record made of the court's action, the alleged error is not a clerical mistake under this rule." 101 Mich App 433. (Citations omitted.)
>
> The Court went on to note that when a plaintiff is not attempting to change the original judgment to more accurately reflect what was done and decided by the lower court but rather is attempting to add something to the prior judgment which was neither discussed nor decided, a motion under GCR 1963, 528.1 is unavailable. Stokus, p 434.

In Grettenberger Pharmacy, the Court refused to find an abuse of discretion by the trial court in refusing to amend an order for a clerical mistake where the amendment sought was not

merely to reflect the actual ruling of the court, but was "trying to add something to the judgment not discussed below."

Surely the trial court and signatory to the order at issue would be in the best position to determine if an order properly reflected the parties' actual agreement, as finally reduced to their written stipulation, as the order on its face states it is doing. Indeed, the order on its face clearly, and accurately, reflects the parties' written stipulation. The order, and stipulation, concededly do not reflect the unilateral oral statements of plaintiffs' counsel regarding his subjective intent prior to reducing the agreement to writing. However those statements were not agreed to by opposing counsel, did not reflect any agreement stated in writing or on the record by opposing counsel, and were utterly irrelevant to the content of the written stipulation and, therefore, to the content of the order executing that agreement.

Accordingly, River District Hospital respectfully requests that this Court find that the Court of Appeals majority expressed, and had, no lawful basis upon which to interfere with the trial court's exercise of discretion in declining to set aside the order of dismissal with prejudice, to which plaintiffs stipulated, under MCR 2.612.

RELIEF REQUESTED

WHEREFORE, defendant St. John Hospital d/b/a River District Hospital respectfully requests that this Honorable Court reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

Respectfully submitted,
KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

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Dated: April 20, 2006

STATE OF MICHIGAN

IN THE SUPREME COURT

JOSEPH and THEODORA STAMPLIS,

Plaintiff-Appellees,

vs.

ST JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,

Defendant-Appellant,

and

G. PHILLIP DOUGLASS, D.O., jointly and severally, HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants. /

Supreme Court
No. 126980

Court Of Appeals
No: 241801

St. Clair County Circuit Court
No: K01-1051-NH

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

DORIS G. JONES, being first duly sworn, deposes and says that she is employed by the law firm of KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK and that on the 20th day of April, 2006, she did serve upon:

VICTOR S. VALENTI (P36347)
Attorneys for Plaintiffs
19390 West Ten Mile Road
Southfield, MI 48075-2463
(248)-355-5555

JOHN P. JACOBS (P15400)
Attorney for Dr. Douglass, only
719 Griswold Street, Suite 600
Detroit, MI 48226-5600
(313) 965-1900

the following documents:

TWO COPIES OF BRIEF FOR DEFENDANT-APPELLANT RIVER DISTRICT HOSPITAL, ORAL ARGUMENT REQUESTED, DEFENDANT-APPELLANT'S APPENDIX AND AFFIDAVIT OF SERVICE.

by having same enclosed in an envelope with postage thereon fully prepaid and deposited in a United States postal receptacle.

Further affiant saith not.

DORIS G. JONES

Subscribed and sworn to before me
this 20th day of April, 2006

Notary Public,

DONNA L. LLOYD
NOTARY PUBLIC, Wayne County, MI
My Commission Expires: Oct. 29, 2006